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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. 846

KANSAS CITY TRANSIT, INC.,
Petitioner,

vs.

KANSAS CITY, MISSOURI,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioner, Kansas City Transit, Inc. ("Transit"), prays that this Court grant a rehearing of its order of January 23, 1967, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri in the above-entitled case as prayed for in the petition filed December 9, 1966, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. The principal argument of Respondent, Kansas City, Missouri, in its Brief in Opposition to the Petition for a Writ of Certiorari, is that Transit did not present to the state court the constitutional question raised in its Petition. This is absolutely untrue. The constitutional violation was raised in Transit's motion for summary judgment filed in the state trial court (R. 15) and was preserved on appeal to the Missouri Supreme Court (R. 81).

Furthermore, the *evidence* upon which Transit's constitutional arguments were based was clearly before the court below when it decided the issue. The contract between the parties (Pl. Ex. 1), as amended (Pl. Ex. 2), and Respondent's ordinance approving the contract (Def. Ex. A), as well as the certified list of operators of motor buses authorized to carry passengers in Kansas City, Missouri (Def. Ex. B), were admittedly before the trial court. Respondent's objection to consideration by the Supreme Court of Missouri of the vehicle traffic counts over the viaduct in question (R. 137) was raised in a motion to strike Transit's Reply Brief, which motion was specifically overruled. (See Petition for a Writ of Certiorari previously filed herein, Appendix A, pp. A14-A15.) Finally, the affidavit that Transit has no franchise (R. 186) was not presented until the motion for rehearing in the court below because that matter was never raised as an issue by either party until the Supreme Court of Missouri handed down its decision based upon the completely erroneous assumption that Transit has an exclusive franchise. The Missouri Rules of Civil Procedure provide that "a motion

for rehearing is to call attention to material matters of law or fact overlooked or misinterpreted by the court, as shown by its opinion." Section 83.16, Vernon's Annotated Missouri Statutes. The affidavit was used merely to substantiate Transit's claim that the factual assumption was erroneous.

2. By its decision, the court below has placed an unreasonable burden on interstate commerce in violation of the Federal Constitution. U.S.C.A., Const. Art. I, Section 8, Clause 3.

The 1917 Agreement (Pl. Ex. 1), as amended in 1921 (Pl. Ex. 2), gives to Transit the exclusive right to operate street cars over part of the viaduct. The Amendment says "exclusive" use. Further, since no one else can operate street cars without Transit's approval and Transit has not approved, then this right is exclusive to Transit (Paragraph 12 of the 1921 Amendment). If the contract, for purposes of imposing a maintenance obligation on Transit, is construed to say and mean that street cars are buses, then street cars must be buses under the exclusive use provision of the contract. Transit, however, cannot be given an exclusive right (as provided in the contract for street cars) to operate buses over the viaduct.

This viaduct runs from Missouri into Kansas and is a major trafficway in Kansas City, Missouri (Pl. Ex. 7). Any attempt by Kansas City to limit its use to Transit buses as distinguished from Greyhound or other buses would be an illegal interference with interstate commerce. Article I, Sec. 8, Clause 3, of the Federal Constitution gives Congress the exclusive power to regulate commerce among the several states.

Buck v. *Kuykendall*, 267 U.S. 307 (1925), is in point. In that case, the State of Washington passed a statute

prohibiting interstate commerce by bus on the Washington highways between fixed termini or over regular routes without a certificate issued by the State. Buck wanted to operate a bus between Seattle, Washington and Portland, Oregon. He applied in Washington for a permit which was denied. Buck then sued the Director of Public Works to enjoin him from interfering with the operation. His suit was dismissed. Justice Brandeis, writing for this Court, held the statute was unconstitutional in language as follows (l.c. 316):

> "* * *. Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden, but to obstruct, it. Such state action is forbidden by the commerce clause * * *."

A similar Maryland statute was held invalid in the case of *Bush & Sons Co. v. Maloy*, 267 U.S. 317 (1924).

These cases were modified by the holding of *Fry Roofing Co.* v. *Wood*, 344 U.S. 157 (1952), which upheld a state statute requiring a permit for identification only and reaffirmed the *Buck* case.

It is clear that a state statute or a city ordinance prohibiting another bus company from using the viaduct without cause would be equally invalid. A contract by the City would be equally illegal and unenforceable. If the City attempted to prohibit the Greyhound Bus Company from hauling fare paying passengers by bus from St. Louis, Missouri to Topeka, Kansas, via the 23rd Street Viaduct, such an attempt would be an illegal interference with interstate commerce. The roads, bridges and viaducts must be open to everyone. Here Kansas City is enforcing a contract which would require it to prohibit all buses, ex-

cept those of Transit, from using this interstate facility. As this Court has stated, the Commerce Clause of the Federal Constitution forbids such undue interference by states and municipalities with interstate commerce.

3. Enforcement of the subject Agreement by Kansas City is a denial of equal protection to Transit in violation of the Fourteenth Amendment. U.S.C.A., Const. Amend. XIV, Section 1.

The 1917 contract was adopted by Kansas City on October 15, 1917, pursuant to Ordinance No. 31,403 (Def. Ex. A). The 1921 Amendment reaffirmed the maintenance obligation of the 1917 contract. Since the 1917 contract was approved, ratified and confirmed by said ordinance, this action is considered state action under the Fourteenth Amendment. *Lovell* v. *City of Griffin, Ga.*, 303 U.S. 444 (1938).

Moreover, the actions in office of municipal officials constitute state action within the prohibition of the Fourteenth Amendment. *McCoy* v. *Providence Journal Co.*, 190 F.2d 760 (1st Cir. 1951).

Thus, the 1917 contract as adopted by Ordinance 31,403, the 1921 Amendment and the attempted enforcement of the contract by Kansas City are considered state action within the ambit of the Fourteenth Amendment and deprive Transit of its equal protection of the law. This is true because other competing carriers have the right and do use the viaduct without payments for maintenance or payments to Transit, in violation of the contract. (Pl. Ex. 1 and Def. Ex. B).

In *Morey* v. *Doud*, 354 U.S. 457 (1957), Doud and others (hereinafter referred to as "appellees") filed suit seeking an injunction against certain state officers of Illinois to prohibit the enforcement of a provision of the Illinois Community Currency Exchange Act. The ques-

tioned provision would have prohibited the appellees from selling money orders in drug and grocery stores, but said provision expressly exempted American Express Company money orders.

This Court affirmed the decision of the lower court in holding the Act violated the Equal Protection Clause. The Court held, l.c. 467-68:

> "The effect of the discrimination is to create a closed class by singling out American Express money orders. The singling out of the money orders of one company is in a sense the converse of a case like Cotting v. Kansas City Stock Yards Co., 183 U.S. 79, 114-115, 22 S. Ct. 30 * * *. In the Cotting case this Court held that a regulatory statute that in fact applied to only one stockyard in a State violated the Equal Protection Clause * * *."

In the *Cotting* case, the Act involved stated that when a stockyard had, within the past twelve months, received a certain amount of livestock, it was considered a public stockyard and certain regulations were imposed including certain minimum charges for handling cattle and hogs. In holding the Act unconstitutional, this Court stated that equal protection is denied when burdens are cast on just one of two parties engaged in the same kind of business and under the same conditions.

To construe this contract so that Transit is still obligated to contribute towards the maintenance of the viaduct has the legal effect of creating an arbitrary distinction between Transit and other members of the same class which imposes on Transit a special, and thus discriminating, economic burden not imposed on other motor bus companies operating in Kansas City.

As shown by the record (R. 137), in addition to Transit there are other carriers of the same class operating over the 23rd Street Viaduct.

Therefore, enforcement of the contract, as Kansas City construes it, results in a violation of Transit's constitutional safeguards guaranteed by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The court below has placed an unreasonable burden upon interstate commerce by virtue of its enforcement against Transit of the 1917 contract, as amended in 1921, in violation of the Interstate Commerce Clause. Moreover, the city ordinance approving the contract and its enforcement against Transit by municipal officials, in light of Transit's current method of operation as a common carrier by bus and the use of the viaduct by other carriers in the same class, constitutes state action which is prohibited by the Equal Protection Clause. For the foregoing reasons and for those set forth in the Petition for a Writ of Certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of Missouri.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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February 13, 1967.